JAMRI JALI & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID J
[CRIMINAL APPEAL NO. 6 OF 1989]
24 MAY 1991

CRIMINAL PROCEDURE: *Corruption - Appeal against conviction - Whether the President of Sessions Court erred in law in having wrongly exercised his discretion under s. 425 of the Criminal Procedure Code.*

The appellants were charged for an offence punishable under s. 4(c) of the Prevention of Corruption Act 1961 and each were convicted and sentenced on 5 February 1988. The petition of appeal listed seven grounds but the Counsel for the appellants only argued the first five of the grounds of appeal. The appeal was against conviction as they contended that the learned Judge had erred in law in having wrongly exercised his discretion under s. 425 of the Criminal Procedure Code.

Held:

[1] Section 425 of the Criminal Procedure Code allows the Court to summon or recall witnesses. The learned Counsel for the appellants did not during the hearing at the Sessions Court object to the Court recalling the Investigating Officer. Thus, the learned Counsel for the appellant cannot now be heard to say that the said Investigating Officer was not a proper person to be recalled.

[2] The learned Sessions Court Judge had the benefit of seeing, hearing (and assessing) the witnesses and he had dealt extensively with the evidence and had put on weight on each aspect thus, the learned Sessions Court Judge was correct in his findings.

[Appeal dismissed and conviction affirmed.]

Cases referred to:
Liew Kaling & Ors. v. PP [1960] 26 MLJ 306 ***(refd)***
Pie bin Chin v. PP [1985] 1 MLJ 234 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 425
Evidence Act 1950, s. 60(1)(a), 114 illus.(g)
Prevention of Corruption Act 1961, s. 4(c)

For the appellants - Chau Chin Tang; M/s. Chau, Thien & Co.
For the respondents - S. Selvanathan, DPP, Anti-Corruption Agency

JUDGMENT

Syed Ahmad Idid J:

The appellants Jamri bin Jali and Daniel Tungguk Maligir were charged as follows:

(1) That you between 20 August 1979 and 30 August 1979 at Kota Marudu District Office, in the District of Kota Marudu, in the State of Sabah, being an agent of the Government of Sabah, namely, Assistant District Development Officer, Kota Marudu, did knowingly use with intent to deceive your principal a document, to wit, General Works Order No.

191288 relating to repairing and painting works of Kg. Goshen Church for the sum of RM8,000, in respect of which your principal was interested and which contained a statement which is false in material particulars, *viz*: work completed 70% and first loan of RM4,000 whereas the said work was not executed at all, and which to your knowledge was intended to mislead your principal and that you have thereby committed an offence punishable under s. 4(c) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57).

(2) That you on 13 November 1979, between the hours of 8 a.m. to 4 p.m., at Kota Marudu District Office, in the District of Kota Marudu, in the State of Sabah, did knowingly give to an agent, namely, Pegawai Daerah Kota Marudu, a document, to wit, General Works Order No. 191288 relating to repairing and painting works of Kg. Goshen Church for sum of RM8,000, in respect of which his principal was interested and which document contained statements which are false in material particulars, *viz*: that the work stipulated in the General Works Order No. 191288 had been duly completed by you whereas the work in the said Works Order was not executed at all, and which to your knowledge was intended to mislead his principal and that you have thereby committed an offence punishable under s. 4(c) of the Prevention of Corruption Act 1961, (Laws of Malaysia Act No. 57).

The two accused (now appellants here) claim trial to both charges and were then, after a lengthy hearing, each convicted and sentenced on 5 February 1988 to (1) one day's imprisonment and a fine of RM2,500 or two months jail in default. The Sessions Court Judge delivered his judgment on 5 July 1988.

When the sentence on the two accused was passed on 5 February 1988, it was urged upon the Sessions Court that both be bound over "because this case had happened since 1979 and the charge was hanging on their heads over the last 7 years. This has been punishment enough. Both have lost their jobs." They had been first produced in Court on 4 August 1982 and their appeal registered at the High Court on 5 April 1989.

The appeal is against conviction and the notice was dated 6 July 1988. Among the grounds of appeal are:

(1) The learned President erred in law in having wrongly exercised his discretion given to him under s. 425 of the Criminal Procedure Code to resolve the doubts created in the prosecution case by the defence submission at the close of its (defence) case.

I cannot say that the learned Sessions Court Judge's exercise of his discretion was wrong as:

(i) Section 425 of Criminal Procedure Code allows the Court to summon or recall witnesses ... ; and

(ii) Mr. Chau, the learned defence Counsel at the trial, did not object to the Court recalling the Investigating Officer (pp. 73 and 74 of the appeal record refer). Mr. Chau cannot now be heard to say that "PW7 certainly was not the proper person to be recalled".

(2) The learned President erred in law in failing to call an expert witness to determine the issue whether the paint as shown in the photographs (Exh. D1a-D1r) had existed before 1979 as such an issue was clearly a crucial point and proof beyond reasonable doubt cannot be established without the benefit of expert evidence.

I cannot see the usefulness of an expert as the only question was whether the church was painted or not at a certain period of time. It was not to prove that a brand of paint was used or the exact date when the coat was painted. Section 60(1) of the Evidence Act 1950, allows for oral evidence and the witnesses had testified to the condition of the church, that is, it

was the evidence of the witnesses who saw it and this complies with s. 60(1)(a) of the Evidence Act 1950. I am satisfied that even without the expert witness, the evidence on this aspect was not prejudicial to the defence.

(3) The learned President erred in law and in fact when he totally disregarded the well established principles of an adversary system of a criminal trial.

(4) The learned President erred in law when he failed to consider the creditworthiness of PW7 (the complainant and the Investigation Officer of the case) and the failure of the prosecution to tender photographs.

(5) The learned President erred in law and in fact in that he had determined the guilt or the innocence of the appellants by preferring the story of the prosecution and without giving valid reasons for rejecting the defence witnesses.

The petition of appeal listed seven grounds of appeal but Mr. Chau decided to delve into grounds (1) to (5) above and then abandoned the other grounds of (6) and (7). I was assisted greatly by Mr. Chau's list of authorities.

I shall now deal with grounds (3), (4) and (5).

(i) In an adversarial system, the Court can prefer one witness to the other and, as in this case, the Sessions Court Judge gave his reasons for doing so, e.g. that the evidence of PW4 and PW5 was preferred because "they were pastors" or that the inconsistencies in the evidence of PW2, PW3 and PW5 were minor. As a presiding Judge, he had the conduct of the case and could form his own conclusion. That was his role as otherwise who else could decide any case?

(ii) The defence claimed that "without any doubt prosecution withheld production of the photographs with ulterior motive". Mr. Chau repeated his earlier submission at p. 73g of the notes of evidence, that is, that the failure to produce the photos attracts the adverse presumption against the prosecution by virtue of s. 114(g) of Evidence Act. Here it must be observed that, after all the evidence, the Sessions Court Judge decided that the non-production was not fatal and on the contrary, it was not quite relevant as "the photos were taken in February 1988, about nine years after the commission of the alleged offence". (p. 4 of the grounds of judgment).

This Court noted the predicament of the two accused; they have lost their jobs and now face the decision of this Court. Anyone reading the notes of evidence recorded by Mr. Sangau Gunting, the learned Sessions Court Judge, or observing the proceedings at the trial could not escape agreeing with the decision of *Liew Kaling & Ors. v. PP* [1960] 26 MLJ 306 where it was held that the test of "proved" is the test of the prudent man according to the "circumstances of the particular case". Here we have the two appellants involved in a crime and on a totality of the evidence, the Sessions Court convicted both.

The learned Sessions Court Judge had the benefit of seeing, hearing (and assessing) the witnesses. Where the credibility of witnesses is raised (as was the case here), I have to be slow to interfere. The learned Sessions Court Judge had given his views after reviewing the evidence in saying (at p. 6 of his grounds of judgment) that "viewed from another angle, the defence contention that the Goshen Church was never painted at all prior to August 1979 had itself seriously damaged the credibility of the defence". In *Pie Bin Chin v. PP* [1985] 1 MLJ 234, it was held that "the learned President in his case had the advantage of having seen and heard the witnesses and there was no reason to disagree with his findings as to the credibility of the complainant." The learned Sessions Court Judge in our case has dealt

extensively with the evidence and the weight he had put on each aspect. At the end of the appeal hearing I am fortified that the learned President (or now the Judge) of the Sessions Court had decided the way he did.

On the grounds put forth in my judgment, I dismiss both appeals and I affirm the conviction. As there was no cross-appeal to enhance the sentence and as I agree with the learned defence Counsel that both appellants had suffered over the years whilst awaiting their fate until today, I also affirm the sentence on each, that is, one day imprisonment and a fine of RM2,500, in default, two further months' imprisonment. I shall only add that the learned Sessions Court Judge was very lenient in his sentence for such a serious offence.

Also found at [1992] 4 CLJ 2008